

October, 1829, at Lee's request, executed to him a written agreement to save him harmless upon paying over to complainant the proceeds of sale of said third part of said crop; that Lee thereupon took the tobacco to Baltimore, sold it, and paid over to complainant the proceeds, which he paid to the counsel for the plaintiffs in said writ in satisfaction thereof.

That on the 9th of October, 1829, before he executed said written agreement, or received the proceeds of sale, Robinson commenced an action of trespass against him in Anne Arundel County Court, for making said levy; that at October term, 1833, this action, by consent of parties and under rule of court, was referred to two referees; that pending this reference, Robinson, to sustain the issue on his part, produced the affidavit of Lee, which, with other testimony, was laid before the arbitrators, and the whole case being fully investigated by them, they, on the 21st of October, 1834, returned an award in favor of complainant, and directed a judgment of *non suit* to be entered in said case, which was done by said County Court on the 29th of the same month, no exceptions to the award having been filed by Robinson.

That pending this action of trespass and before the reference thereof, to wit, on the 10th of August, 1832, Robinson knowing that Lee held complainant's said written agreement, commenced an action in said County Court against Lee, to recover the money in the form of rent, which Lee had so as aforesaid paid to complainant, which cause came on for trial at the October term, 1834. That though Lee knew of the decree and *fieri facias*, and the levy aforesaid, and the pendency of said action of trespass, and had himself given testimony therein, which formed a perfect defence in a suit against him, Lee, yet he omitted to plead, or adduce in evidence, or insist upon said matters in defence, and wholly omitted and neglected to give complainant notice, or call upon him, or give him an opportunity of urging said matters in defence of said suit, and at the trial actually abandoned the defence he had made, and consented to a verdict and judgment against him, waiving at the same time a decision of the court, that the action could not be sus-